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In The

Supreme Court of the United States

October Term, 1982

No.

LOCAL UNION NO. 680,
MILK DRIVERS AND DAIRY EMPLOYEES
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA
Cross-Petitioner,

v.

LUCIA NOVEMBRE And ANNA DELUCA,
Respondents.

CROSS PETITION OF LOCAL 680, MILK DRIVERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a local union president who is in good faith mistakenly stated to its members, who were pension fund participants, that a reciprocity agreement between two pension funds existed when in fact no reciprocity agreement existed, violated his duty to fairly represent the union members-pension fund participants and thus renders the local union liable to pay from the union treasury the otherwise never existent pensions, as if a reciprocity agreement had existed in fact?

(2) Whether the duty of fair representation to a bargaining unit member continues to exist after the member withdraws from the union and the bargaining unit goes out of existence?

THE PARTIES

Local Union No. 680, Milk Drivers and Dairy Employees, (herein Local 680), is the Cross-Petitioner on a Petition filed by the Ice Cream Industry Drivers and Ice Cream Employees Union Pension Fund, (herein the Ice Cream Fund), both parties being defendants in the district court and appellants in the Court of Appeals.

Respondents are Lucia Novembre and Ann DeLuca, who were plaintiffs in the district court and appellees in the Court of Appeals.

In addition to this Cross-Petitioner and the original Petitioner, other defendants in the district court were Local 584, the Local 584 Pension Trust Fund (herein Local 584 Pension Fund), the Local 584 Welfare Trust Fund (herein the Local 584 Welfare Fund), the Ice

Cream Welfare Fund, and three individual union officers: John Kelly, Larry McGinley (sic), and Tony Iorio.

The district court found liability against Local 584, Local 680, the Local 584 Pension Fund and the Ice Cream Fund. Local 680 and the Ice Cream Fund appealed the district court judgment to the Court of Appeals.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ICE CREAM INDUSTRY DRIVERS AND ICE CREAM EMPLOYEES UNIONS PENSION FUND ("THE ICE CREAM FUND"),

Petitoner

v.

LUCIA NOVEMBRE and ANN DELUCA,

Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINION BELOW

The opinions of the United States District Court for the District of New Jersey, dated February 17, 1981 and May 7, 1981, appearing in Petition as Appendix A and B respectively, are incorporated herein by reference.

The Judgment-Order of the United

States Court of Appeals for the Third Circuit, dated July 29, 1982, affirming the district court judgment, appearing in the Ice Cream Fund's Petition as Appendix C, is incorporated herein by reference. The opinions below are unreported.

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Third Circuit was entered on July 29, 1982. (Appendix C). The jurisdiction of this Court is involved pursuant to 28 U.S.C., Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 29 U.S.C., Sections 152(5), and 159(a) are printed in Appendix D of this cross-petition.

STATEMENT OF CASE

Cross-Petitioner, Local Union No. 680, Milk Drivers and Dairy Employees affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is an unincorporated labor organization within the meaning of Section 152(5) of the Labor Management Relations Act of 1947 ("Taft-Hartley Act") 29 U.S.C. 151 et. seq. During the time of the events, an individual named McGinley held the presidency of Local 680. Additionally, McGinley also served as one of the ten trustees of the Ice Cream Fund.

Prior to 1966, Local 680 represented the drivers and clerical employees by Consumers Dairy. Pursuant to collective bargaining agreements, covering each separate unit, Consumers

made pension fund contributions on behalf of its employees to the Ice Cream Fund. (The Ice Cream Fund is a multi-employer, joint union-management pension fund established to provide pensions to covered employees.)

The two respondents, Novembre and DeLuca, were employed by Consumers in the clerical bargaining unit. In 1966, as a result of a corporate merger, the two Respondents shifted their employment from Consumers to Sealtest. The employees of Sealtest were represented by Local 607, and later, as a result of a union merger, by local 584. After Respondents' transfer of employment, they withdrew their membership from Local 680 and became members of Local 607, and then Local 584. During Respondents employ-

ment at Sealtest, they participated in the Local 584 Pension Fund. After Respondents withdrawal from Local 680 and transfer of employemnt from Consumers, Local 680 no longer had any representational rights of Respondents and no further pension fund contributions were made on Respondents behalf in to the Ice Cream Fund.

In 1975, the two Respondents each applied for pensions from the Ice Cream Fund. The Ice Cream Fund, in accordance with rules and regulations of its indenture, denied the pension applications as neither of the two Respondents had earned the minimum number of credited pension service with a contributing employer.

Respondents then brought suit in the United States District Court for the District of New Jersey.

Respondents based their claim against Local 680, and the district court so found, upon a 1966 statements made by Local 680 President McGinley to an assemblage of the Consumers drivers and clerical employees concerning the Consumer merger with Sealtest. The District Court found that McGinley stated that the employees would be able to carry over their Ice Cream Fund service credits to their new employer's pension fund. In fact, while a reciprocity agreement may have existed between the two funds as to the drivers bargaining unit, no such agreement existed for the clerical employee unit, and accordingly, Respondents DeLuca and Novembre pension rights against the Ice Cream Fund depended solely upon their extent of credited service with the Ice Cream Fund.

By its two opinions dated February 17 and May 7, 1981, the district court held Local 584 and Local 680, and the Local 584 Pension Fund and Ice Cream Pension Fund liable for the money that Respondents would have received as if there had been a reciprocal agreement between the two Funds. In reaching its judgment, the district court found that McGinley and the Local 607 union officials each misrepresented Respondents' ability to carry over their respective pension credits from the Ice Cream Pension Fund to the Local 584 Pension Fund, and that when McGinley later discovered that no such reciprocity agreement existed he failed in his duty to so inform Respondents. In this regard, but in its discussion concerning Respondents' request for

attorneys's fees, the district court specifically address the questions whether the Local 680's agent had acted in bad faith, and after analysis ruled Local 680's president, McGinley, had not acted in bad faith.

DISTRICT COURT JURISDICTION

Jurisdiction in the district court was proper under 29 U.S.C.§§185(a) and 1132(f).

REASONS FOR GRANTING THE WRIT

Throughout the nation there are tens of thousands of union agents of thousands of labor organizations, who as the statutory bargaining representatives of union members conduct the various affairs of the union. The question presented in this petition is of vital concern to all unions and their memberships as it involves a radical departure from precedent in that it establishes a new, higher standard of review upon which the

actions of the union agents are measured and consequent liability imposed against the general membership treasury. Further, it imposes upon unions a continuing duty to individuals it no longer represents and who are no longer members.

a. A Findings of Breach of the Duty of Fair Representatives has always required a finding of an element of improper union motivation such that the union action can be described as arbitrary, discriminatory or in bad faith.

The Court has consistently recognized that many competing, and sometimes conflicting, interests are involved in conducting the affairs of a union. Additionally, the Court has been cognizant of the limited resources available to unions for carrying out its functions. Accordingly, the Court has constructed criteria of review which permits the union the exercise of a wide range of reasonableness and room to commit honest mistakes.

Noting that the springhead of the duty of fair representation is the union's statutory grant of exclusive bargaining agency, see 29 U.S.C., Section 159(a), the Court has consistently interpreted the scope of the duty as being correlative to the scope of bargaining authority. Humprey v. Moore, 375 U.S. 335, 342 (1964) and Electrical Workers v. Foust, 442 U.S. 42 (1979). Because the scheme granting unions exclusive bargaining authority necessarily strips individuals of traditional forms of redress, the Court has required unions to act in good faith and with honesty of purpose. Ford Motor Co. v. Huffman, 345, U.S. 330 (1953).

It is important to understand that the duty was created to provide protections as opposed to declare new rights. In recognition of the purpose, case

rulings have defined the duty in terms of prohibitions of conduct as opposed to establishing affirmative standards of conduct. The ruling of Vaca v. Sipes, 386 U.S. 171 (1967) offers the clearest announcement of when the duty is violated:

> A breach of the statutory duty of fair representation occurs only when a unions's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith... 386 U.S. at p. 190.

Subsequent cases in the Circuits have suggested more detail bounaries of the duty. Consistently noting that improper motivation is the very crux of fair representation, and an essential element in all fair representation cases, the Circuit Courts have ruled that ineptitude, carelessness, inadvertence, or negligence does not constitute arbitrary, discrimina-

atory or bad faith conduct as is required to violate the duty. Findley v. Jones Motor Freight, ect., 639 F. 2d 953, 960, (CA.3, 1981); Ruzicka v. General Motors Corp., 649 F. 2d 1207 1212 (CA. 6, 1981); Hoffman v. Lonza Inc., 658 F. 2d 519, 521, (CA. 7, 1981); Coe v. United Rubber, Cork, Linoleum & Plastic Workers of America, 571 F. 2d 1349, 1350-51, (CA. 5, 1978); Harris v. Schwerman Trucking, Co., 668 F. 2d 1204 (CA. 11, 1982). Previous to this case, the Third Circuit was firm in its adherence to requiring a showing of actual bad faith or arbitrary conduct. Riley v. Letter Carriers Local No. 380 668 F. 2d 224, (CA. 3, 1981); Findley v. Motor Freight, ect., 639 F. 2d 953, 961 (CA. 3, 1981).

The gravamen of this case centers upon a union agent's misstatement that

pension reciprocity existed when in fact it did not exist, and after later discovery of the true facts, the subsequent failure of the agent to seek out and advised the former bargaining unit members (who withdrew from the union and transferred to another local) of the error of the statement. The Third Circuit found the duty breached twice; firstly by the misstatement and secondly by the failure to advise the error. (Appendix A). Notwithstanding these conclusions the Third Circuit nevertheless specifically ruled the union did not act in bad faith. (Appendix B). In essences, the union agent made a mistake through ineptitude, negligence or carelessness. In any case, such action was not found to be within the prohibited delineations of Vaca v. Sipes, supra.

This petition warrants consideration as supervision is needed to correct the abandonment of the "bad faith" requirement mandated by Vaca v. Sipes, supra. for establishment a breach of the duty. Further, the Third Circuit decision has drastically stretched the duty beyond previous limits by imposing the existence of a continuing duty, even after the union has lost its representational and bargaining rights; that is, the source upon which the duty, springsforth. Plainly, while the Third Circuit may have ruled with a sentimental focus upon the individual plaintiffs involved, it clearly broke precident and opened broad new gateways for imposing liability upon unions and bankrupting the members general treasury.

CONCLUSION

It is respectfully requested that the certiorari should be granted to supervise the past decisions of the Court.

Respectfully Submitted,

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Dated: November 24, 1982
Jersey City, New Jersey

APPENDIX "A"
DISTRICT COURT OPINION
DATED FEBRUARY 17, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LUCIA NOVEMBRE AND ANN DELUCA,

Plaintiffs,

-v-

LOCAL 584 PENSION TRUST
FUND AND WELFARE
TRUST FUND, et al.,

Defendants.

HONORABLE H. LEE SAROKIN, U.S.D.J.:

The following facts are undisputed: Plaintiffs, Lucia Novembre and Ann DeLuca, are former employees of Consumer's Dairy and Sealtest and former members of defendant Local 680 and later of defendant Local 584, for whom pension benefit contributions were made by Consumers Dairy to defendant Ice Cream Industry Pension Fund and later by Sealtest to defendant Local 584 Pension Fund.

Defendant Local 584 Pension Fund is a separate, distinct and autonomous trust fund established pursuant to written agreement in compliance with the requirements of Section 302 of the Labor Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974.

It has a tax exempt status under the Internal Revenue Code.

Defendant Local 584 is a labor organization within the meaning of the Labor Management Relations Act, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Defendant Ice Cream Pension Fund is a separate, distinct and autonomous trust fund established pursuant to written agreement in compliance with the requirements of Section 302 of the Labor and Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974. It has a tax exempt status under the Internal Revenue Code.

Defendant Local 680 is a labor organization within the meaning of the Labor Management Relations Act, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Defendant John Kelly is a former officer of Local 584 and a former trustee of the Local 584 Pension Fund. He has not been served with summons and complaint in this action, and the matter was voluntarily dismissed as against him.

Defendant Larry McKinley was formerly an officer of Local 680 and defendant Tony Iorio was formerly an officer of Local 680.

The complaint was voluntarily dismissed as against both of said individual defendants. Therefore, the only remaining defendants are the two unions and the pension trust funds aforesaid.

This Court has jurisdiction by virtue of Section 301, 302 and 302 (e) of the Labor Management Relations Act. 29 USC Section 185, 186 and 186 (e).

Plaintiff Novembre was employed by the following employers who had a collective bargaining agreement with the union locals indicated below which agreement covered the wages, pension contributions and other terms and conditions of employment of Novembre with said employer, to wit, as follows:

From July 17, 1950, to October 1958 she was employed by Consumers Dairy in Union City and was a member of Local 680.

From October 1958 to January 1, 1966, she was employed by Consumers Dairy in Newark and continued membership in Local 680.

From January 1, 1966, to November 3, 1967, she was employed by Sealtest in Newark and was a member of Local 607, which union was later merged into Local 584.

From November 3, 1967, to June 6, 1970, she was employed by Sealtest in New York and continued with 607, and from June 6, 1970, to November 8, 1974, she continued to be employed by Sealtest in Jamaica and Long Island City, and was a member of 584 after its merger with 607.

Plaintiff DeLuca was similarly employed by Consumers Dairy at the place of business indicated above for the period November 1958 to January 1, 1966 and by Sealtest for the period January 1, 1966, to November 1st, 1974.

Within the respective periods mentioned above, plaintiffs Novembre and DeLuca were members in good standing of the aforesaid Locals, 584, 607 or 680 for the relevant time period.

At all times mentioned the successive and respective collective bargaining agreements between defendant unions and plaintiffs' respective employers required the latter to make pension contributions to the defendant pension funds.

Plaintiff Novembre's employer, Consumers Dairy, made contributions for and on her behalf to the defendant Ice Cream Fund during the period July 17, 1950, to January 1, 1966.

Her employer, Sealtest made pension contributions for and on her behalf to the Local 584 Fund during the period January 1st, 1966, to November 8th, 1974.

Plaintiff DeLuca's employer, Consumers Dairy, made pension contributions for and on her behalf to the Ice Cream Fund for the period November 1959 to January 1, 1966.

Her employer Sealtest made pension contributions for and on her behalf into the Local 584 Fund for the period January 1, 1966, to November 1, 1974.

The employment of plaintiff DeLuca and Novembre terminated on November 1 and November 8, 1974, respectively.

Local 584 Pension Fund and Ice Cream Industry Pension Fund are separate and distinct and autonomous trust funds established pursuant to separate written agreement in compliance with the requirements of Section 302 of the Labor Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974.

Defendant pension fund provides pension benefits in the form of normal or regular pensions, reduced pensions, early retirement pensions and similar types of

pensions pursuant to the terms of the rules and regulations of the fund.

The records of the respective pension funds show the amounts of pension contributions by employers and of credited service for each plaintiff.

Under the rules and regulations of the respective pension fund such records are the sole basis for determining each plaintiff's pension credit with respect to each pension fund.

Local 584 Pension Fund's records show that when plaintiff Novembre last worked for an employer covered by the plan in 1974 she was 55 years of age and had eight and three-quarters years of credited service.

Local 584 Pension Fund records show that when plaintiff DeLuca last worked for an employer covered by the plan in November 1974 she was 58 years of age and had seven and one-half years of credited service.

At the time plaintiff worked in employment covered by the Local 584 Pension Fund Plan the minimum requirements for obtaining a pension in Local 584 Pension Fund were for an early retirement pension for an employee who had attained the age of 55 and who had completed at least 15 years of credited service.

The minimum requirement for pension based upon service alone with regard to age at that time was at least twenty-five years of credited service. Neither plaintiff had the minimum credited service necessary to obtain a pension from the Local 584 Pension Fund pursuant to its rules and regulations.

Ice Cream Industry Pension Fund records show that when plaintiff Novembre last worked for an employer covered by the plan

in December 1965 she was 46 years of age and had 15 years and five months of credited service.

Ice Cream Industry Pension Fund records show that when plaintiff DeLuca last worked for an employer covered by the plan in December 1965 she was forty-nine years of age and had seven years and two months of credited service.

At the time plaintiffs last worked in employment covered by the Ice Cream Industry Pension Fund the minimum requirement for obtaining a pension from the Ice Cream Industry Pension Fund was for an early retirement pension for an employee who had attained the age of 55 and who had completed at least 15 years of credited service. The minimum requirement for a pension based on service alone with regard to age at that time was at least 30 years credited service.

Neither plaintiff met the minimum requirements for a pension from the Ice Cream Industry Pension Fund pursuant to its rules and regulations.

No express reciprocal agreement or other agreement of any kind exists permitting the Local 584 Pension Fund to grant either plaintiff any type of pension benefits based upon pension contributions made to the Ice Cream Industry Pension Fund by plaintiffs' employers or based upon pension credits earned by plaintiffs pursuant to the rules and regulations of the Ice Cream Industry Pension Fund.

No express reciprocal agreement or other agreement of any kind exists permitting the Ice Cream Industry Pension

Fund to grant either plaintiff any type of pension benefit based upon pension contributions made to Local 584 Fund by plaintiffs' employers or based upon pension credits earned by the plaintiffs pursuant to the rules and regulations of the Local 584 Pension Fund.

Plaintiffs were denied pension benefits by the Local 584 Pension Fund and by the Ice Cream Industry Pension Fund on the ground that they did not qualify for any type of pension provided by either pension fund and that no express reciprocal agreement or other agreement exists permitting either pension fund to grant either plaintiff a pension based upon pension contributions made to the other pension fund or based upon pension credits earned by plaintiffs pursuant to the rules and regulations of the other pension fund.

This case presents the following issues:

1. Whether any officer of either of the defendant local unions or any trustee of the defendant pension funds made any representation to either plaintiff concerning her eligibility for pension right;
2. Whether any of the individuals named in the complaint were authorized to speak for or bind defendant unions and pension funds;
3. Whether defendants Local 584 Pension Fund and Ice Cream Industry Pension Fund are bound or obligated by statements, if any, made on behalf of defendant Local 584 or Local 680 concerning eligibility or qualification for pension benefits;

4. Whether plaintiffs continued to work for Sealtest in reliance upon the statements allegedly made by the defendants;

5. Whether plaintiffs have been injured or damaged by defendants, and in particular the alleged misrepresentations.

All of the foregoing facts are undisputed. The factual dispute centers around a meeting which took place in the latter part of December 1965.

Plaintiffs at that time were employed by Consumers Dairy and there were rumors of a merger between Consumers and Sealtest. The employees were concerned regarding the consequences to them of such a merger.

Plaintiffs offered testimony regarding the meeting which took place in the latter part of December 1965. The meeting was described as "The Last Supper."

The testimony was that a dinner meeting was held at the Essex House in Newark. Dinner was preceded by a cocktail hour and was followed by speeches.

Representing Local 607 was Mr. Bornstein who was the secretary-treasurer of Local 607 and was a trustee of the Milk Industry Fund.

Representing Local 680 was Mr. McKinley, who was its president and who was also a trustee of the Ice Cream Industry Fund as well as the Milk Industry Fund.

Local 680 was also represented by Mr. Iorio, who was an officer of the union and its business agent, and he also was a trustee of the Ice Cream Industry Fund as well as the 680 Milk Fund.

All of the drivers, platform workers, plant and office workers who would be affected by the merger were invited.

Plaintiffs presented testimony that Mr. McKinley made a statement to everyone present that the employees would carry over their seniority, pay scale and pension credits from Local 680 into Local 607. He informed the audience that there would be no break in their pension benefits.

Plaintiffs also presented testimony that Mr. Iorio made a similar statement which was repeated by Mr. Bornstein.

In effect all three gentlemen reiterated that the employees would carry with them their pension benefits. There was no distinction made between what would transpire in respect to the benefits of the drivers as compared to the office workers.

That version of the meeting is confirmed by Mr. Hawkes and the deposition of Mr. Healey, who were present at the meeting.

After the public statements were made the plaintiffs had a private conversation with Mr. Bornstein and Mr. Iorio wherein they both confirmed and reiterated what had been stated publicly, namely, that the employees would carry their pension credits with them into the 607 Local.

Defendants presented a different version of the same meeting through Mr. McKinley. He testified that he knew prior to the meeting that the office workers were not covered by any reciprocal agreement and that they and the plaintiffs in particular would not be carrying their pension credits with them.

He testified that the meeting was not a dinner meeting, that there were no drinks served and that the meeting was scheduled for four o'clock in the afternoon. It was called by the union through oral communication to the shop steward.

Mr. McKinley concedes that he, Mr. Iorio and Mr. Bornstein were present.

He testified that he spoke at the meeting and discussed the fact that the employees would be transferred from Local 680 into Local 607, that all benefits would be transferred with the drivers, with the dairy workers, but not the office workers because there was no reciprocal agreement.

He testified that he confirmed that statement in a private meeting with the plaintiffs, Mr. Iorio and Mr. Bornstein, thereafter.

He testified that he and Mr. Bornstein informed the plaintiffs that although there was no reciprocal agreement in effect that they would try to obtain one and that they were optimistic that such agreement would be consummated.

All parties agreed that there were no further conversations between Mr. McKinley and the plaintiffs from that moment on.

As to the disputed facts and in particular what transpired at the meeting in December 1965, the Court makes the following findings of fact: The employees, including the plaintiffs, were concerned about the consequences of the proposed merger. They would and did ask at the meeting how the transfer from Local 680 to Local 607 would affect their seniority, wages, pension benefits, et cetera.

The Court accepts the version of that meeting as presented by the plaintiffs. The Court specifically finds that the persons who spoke for the unions were authorized to do so and had the authority, either express or implied, to do so.

The Court accepts the plaintiffs' version of the meeting because that meeting was of great importance to the plaintiffs, more so than to Mr. McKinley. It was the only such meeting that the plaintiffs ever attended, whereas Mr. McKinley attended many meetings. He testified that he attended one union meeting a month, two trustee meetings a month, and usually thrity-five other meetings during the course of a year, making an average of over seventy meetings a year.

But the dinner meeting was a very rare occasion for the plaintiffs and certainly one sponsored by their union.

Mr. Hawkes and Mr. Healey were independent witnesses with no interest in the outcome of this case. The defendants offered no one to support Mr. McKinley's version, not Mr. Iorio or anyone else who was present, and there was testimony that at least 40 other persons were present at that meeting.

There is also a serious doubt in the Court's mind whether McKinley would have mentioned the lack of reciprocity in respect to the office workers because he testified that he did not know if the office employees had a union contract.

If they did not have such a contract there would have been no occasion to discuss or even consider the existence of the reciprocal agreement.

Furthermore, Mr. McKinley could not remember any of the other details of what was discussed at that meeting. And in fairness to Mr. McKinley, that is certainly understandable. The incident occurred more than fifteen years ago. Plaintiffs would be much more apt to remember it because of the great importance to them.

I do not find that Mr. McKinley deliberately testified falsely, but I do find that the plaintiffs and their witnesses have a more accurate recollection of those events.

In addition, the plaintiffs version is born out by the subsequent events to be discussed hereafter.

After the conclusion of the meeting and for a long period of time thereafter the plaintiffs repeatedly asked Mr. Bornstein to confirm to them that their pension rights would be carried over into 607 and requested that such confirmation be furnished to them in writing.

His response was substantially the same on each occasion; they were advised not to worry about it, he said words to the effect, "I am here, you are entitled to it, you will get it, don't worry."

Although not particularly significant, the plaintiffs requested the 584 Pension Fund Booklet but never received it.

The Court further finds that Mr. McKinley did in fact try to obtain the reciprocal agreement which would have benefited the plaintiffs. He received a tentative informal approval by the Ice Cream Fund but the 584 Fund refused to enter into the agreement, as evidenced by D-7, minutes of the meeting dated September

12, 1972, a decision reached some five years after the 1965 dinner meeting and five years after the plaintiffs had steadily worked for Sealtest.

Most significant to the Court is the fact that even after both funds knew that there would be no reciprocal agreement, no one so advised the plaintiffs.

Therefore, the Court finds that there was a misrepresentation regarding plaintiffs ability to carry over their respective pension credits from Local 680 to Local 607, and that there was a failure to advise plaintiffs that the 584 Fund had refused to grant reciprocity when there was a duty to so inform plaintiffs.

Plaintiffs clearly relied upon the representations that were made to them. They commenced and continued their employment with Sealtest. They moved with Sealtest each time it moved to a point when plaintiffs were travelling to and from their employment for as much as four to five hours a day. They did not look elsewhere for employment because of the fact that they were satisfied based upon the representation that they would preserve their benefits by continuing in employment with Sealtest. Had they been informed at the end of 1965 that they could not and would not continue their pension credits they could have obtained employment with other employers having agreements with Local 680. There were eighty such potential other employers.

There is evidence that at least one other office employee from Consumers obtained such employment, a Lorraine Samer.

There is no requirement that the plaintiffs prove that they could have obtained a specific job at that time. That would be an unfair burden to impose upon the plaintiffs some fifteen years later.

As stated above, plaintiffs were never advised that the 584 Fund would not agree, and therefore, they continued to rely upon the representations made to them by remaining employees of Sealtest.

For the same reason the Court finds that they never filed any grievance because they were under the impression that there was no reason to do so, they were not advised of the decision regarding their pension benefits until they terminated their employment.

It is also significant that when Sealtest merged with a company called Delwood the plaintiffs elected not to continue their employment because they were advised that there was no reciprocity and that they could not carry their pension credits with them.

The Court finds that under these circumstances the reliance by plaintiffs was reasonable and that plaintiffs clearly sustained damages since they were denied their pension benefits.

The foregoing facts support plaintiffs claim of misrepresentation and estoppel, but the issue remains whether said facts create liability as against one or more of the defendants and whether the doctrine of estoppel is applicable to either the unions or the pension funds.

As to the pension funds, the trustees are required by applicable Federal Law to

administer the pension fund solely for the benefit of employees eligible for benefits under the pension plan. Aitken v. IP & GCS Employer Retirement Fund, 604 F. 2d 1261, Ninth Circuit, 1979; Thurber v. Western Conference of Teamsters Pension Plan, 542 F. 2d 1106, Ninth Circuit, 1976; Moglia v. Geoghegan, 403 F. 2d 110, Seocnd Circuit, 1968, Cert denied 394 US 919, 89 Supreme Court 1193, 1969.

Section 302 of the Labor Management Act of 1947, as amended, 29 USC 186, has been construed by the Courts to require strict compliance by pension fund trustees with the requirements of Section 302(c). In particular, pension trust funds must be established and maintained for the sole and exclusive benefit of employees, and their dependents, of contributing employers in accordance with a written trust agreement and pension plan. Pension benefits may be granted only to persons eligible under the trust agreement and pension plan.

Trustees of a Taft-Hartley Section 302 Labor Management Pension Fund cannot be estopped into the illegal act of paying pension benefits to ineligible persons; Aitken, Supra and Thurber, Supra. The Ninth Circuit, per curiam, rejecting Thurber's claim that equitable estoppel could be applied to prevent the pension fund from denying his eligibility for a pension stated:

> "The fact that Thurber relied on representations of an employee of the firm retained to administer the trust fund would not estop the pension fund and its trustees from denying Thurber's eligibility for

> the pension. The rights of other pensioners must be considered, and the trust fund may not be deflated because of the misrepresentation or misconduct of the administrator of the fund. We agree with the District Court that the doctrine of estoppel may not be invoked to compel an illegal act," 542 F.2d 1106 at 1109.

In Phillips v. Kennedy, 542 F. 2d 52, 1976, stated:

> "We are urged to decide this case on the basis of an estoppel allegedly created by the acceptance of payments made to the fund by Phillips' employer, assurances made to the president of Tri-State by a local union official and by a union trustee that Phillips would be included in the plan, the payment of retirement pension to an employee with similar status at Tri-State as Phillips and misleading statements in the brochure distributed by the fund describing pension rights. We decline to do so. The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan," citations omitted.

Plaintiffs rely upon the case of Carlsen v. Masters, 80 NJ 334, 1979, which supports their position, but it does not deal with the Federal policy concerns militating

against application of the doctrine of estoppel.

As stated during the colloquy with counsel this Court questions whether such policy considerations would bar all tort claims against pension funds. Certainly any tort recovery for negligence or fraud would require a payment other than to an eligible person. But since the representations involved in this matter go directly to the issue of eligibility, that distinction is not involved herein.

Therefore, the Court concludes that the doctrine of estoppel cannot be applied as against the pension funds, and the funds are not liable to the plaintiffs to pay pension benefits.

On the other hand, since the representations were made by persons who were representatives of the unions as well as representatives of the funds, the Court believes that it would not be appropriate for the funds to benefit from the wrong doing of the representatives.

Therefore, insofar as the funds are concerned, there will be a judgment in favor of the plaintiffs and against the funds to the extent of employer contributions actually made to the fund for the benefit of the plaintiffs, with interest. That determination applies to contributions made both before and after the misrepresentations were made.

As to the future contributions, there can be no dispute that employment was continued in reliance upon the representations that were made.

As to the past contributions, however,

as already stated, the misrepresentations caused plaintiffs not to take action they could have taken to receive the benefit of those past contributions.

As to the unions, the same policy considerations do not apply. Insofar as they are concerned this is a simple case of misrepresentation with all of the essential elements having been proved and the appropriate burden satisfied.

In Louis Schlessinger Company v. Wilson, 22 NJ 576, 585, 1956, the Supreme Court of New Jersey stated that the necessary elements for a fraud action are a false representation, knowledge or belief by the defendant of the falsity, and intention that the plaintiff act thereon, reasonable reliance in acting thereon by the plaintiff and resultant damage.

The Court has already indicated that there was a misrepresentation. Mr. McKinley admits that the representation was untrue in that he knew that there was no reciprocal agreement.

Those persons acting on behalf of the unions were authorized to do so. It was intended that the audience rely upon the representations.

Their reliance, as already indicated, was reasonable. And they sustained damages as a result of the loss of their pension benefits.

The Court might also add that even if the version of Mr. McKinley were accepted by the Court, namely, that plaintiffs were advised that there was no reciprocal agreement, but that the two funds would try to reach one, even when that fact was known

to both of the funds and to the unions, no one bothered to inform the plaintiffs, even though there was a clear duty to do so at the time.

So the failure to speak as of that moment was likewise a misrepresentation.

Therefore, based upon the foregoing judgment shall be entered in favor of the plaintiffs and against the unions for damages equivalent to the pension benefits plaintiffs would have received less the actual contributions plus interest to be paid by the pension fund.

The allocation between the unions shall be the same as though a reciprocal agreement had been in effect.

Interest shall be added to any part due payments.

The parties shall submit a judgment consented to as to form, including all of the calculations, in accordance with this opinion. The amounts due from the pension fund shall be applied against the past-due payments due to the plaintiffs.

As to future payments, plaintiffs may elect to receive a lump sum with appropriate reduction for present value or receive payment as contemplated under the pension plan. I would suggest that counsel discuss the matter and try to resolve the terms and calculations.

Now, Mr. Morgan, since you are the only person present, I would like you to undertake to discuss this with your colleagues, decide who will prepare the form of judgment. I hope it is clear what I have done.

I think the arithmetic might be a little complicated but I'm sure that you can work it out.

APPENDIX "B"
DISTRICT COURT OPINION
DATED MAY 7, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LUCIA NOVEMBRE AND ANN DELUCA,

Plaintiffs,

-v-

LOCAL 584 PENSION TRUST
FUND AND WELFARE
TRUST FUND, et al.,

Defendants.

HONORABLE H. LEE SAROKIN, U.S.D.J.:

After my decision in this matter the 3rd Circuit rendered its decision in the matter of Rosen v. Hotel & Restaurant Employees and Bartenders Union on February 23rd, 1981. I called that decision to the attention of counsel and requested that they advise me whether it warranted a reconsideration of my decision in this matter which had been rendered prior thereto.

Counsel have submitted briefs and plaintiffs have moved for rehearing predicated upon that decision.

Initially I followed the Court in the Phillips case which declined to apply the Doctrine of Estoppel against the defendant where the fund made assurances to plaintiff

that he would be included in the pension plan on the ground that the actuarial soundness of the pension fund is too important to permit the trustees to pay pension to persons not entitled to them under the express terms of the pension plan absent extraordinary circustances.

In the Rosen case the Court indicated that it was sensitive to the Phillips Court concern for actuarial soundness but held that actuarial soundness was not an issue in the case because contributions had been made in fact to the fund.

In this case the employers for the respective plaintiffs made actual contributions to the fund, and therefore, under the same reasoning, the actuarial soundness of the funds is not an issue in this case.

However, the Rosen Court nonetheless seems to indicate that there must be something more than reliance on mere assurances made by the trustees to create an estoppel even if actuarial soundness is not an issue in the case.

The Rosen Court held that by virtue of the fact that plaintiff furnished monies which were deposited into the fund's account, such deposits were classified or characterized as one of the "extraordinary circumstances" contemplated by the Phillips decision.

It is difficult for this Court to distinquish between the deposit of monies by the employees in the Rosen case and the reliance by the plaintiffs in this case in not seeking other employment which would have assured their pension rights and

travelling many hours to distant locations in order to preserve the rights which had been represented to them plus, of course, the actual contributions which were made by their respective employers into the fund.

As I indicated during the colloquy with counsel, the distinction, if any, does not go to the acts of reliance, but to the acts of the representatives of the fund. In both cases assurances were made of coverage but in the Rosen case a specific request was made for deposit into the fund sufficient to make up any arrears and a deposit was made pursuant thereto.

Therefore, in the Rosen case, the acts of the trustees were more than a mere assurance of coverage. A specific request was made for monies and payment was made in reliance thereon.

The theory of the Phillips case to the extent adopted by Rosen Court bars the use of estoppel where the actual actuarial soundness of the fund might be affected by its application; however, the Rosen Court indicates that a determination should be made in each case whether the actuarial soundness of the particular fund is affected by the application of the Doctrine of Estoppel.

Following the dictates of the Rosen Court in this case, the actuarial soundness is not affected by reason of the contribution of the respective employers of the plaintiff. Therefore, although the Rosen case seems to indicate that a finding of extraordinary circumstances is still required there does not appear to be any rationale for such a requirement.

The extraordinary circumstances suggested by the Phillips Court are necessary where the actuarial soundness of the fund may be affected, but where the actuarial soundness will not be affected there is no reason why the Doctrine of Estoppel should not be applied to pension funds in the same manner as it is applied to all other persons or entities.

Furthermore if extraordinary circumstances are demonstrated by "tangible detrimental reliance" this Court can see no distinction between the specific contribution made in the Rosen case and the facts that the plaintiff in this case did not seek other employment and travelled miles and hours to preserve the pension benefits which had been assured to them plus, as I have already indicated, the actual contributions made by the respective employers.

Therefore, the prior decision of this Court is hereby amended to impose liability on the pension funds for the full amount of the pension benefits to which plaintiffs otherwise would have been entitled, and the funds should be jointly and severally liable with the union defendants.

Past due payments, as already indicated, shall be with interest and the parties should calculate and allocate the future payment in accordance with this decision as amended.

I recall indicating in my earlier decision that I think plaintiffs should discuss with defendants whether or not they want the present value or whether they want future payments to be as though the reciprocal agreement had existed and

the pensions are in effect. If you can't work that out I will decide it, but I think that the numbers should be the same, it really ought to be up to the plaintiffs whether they want it now or whether they want future payments as though they were members of the fund from the outset.

In respect to the application for counsel fees, plaintiffs in this action seek attorney's fees on the basis of the alleged bad faith on the part of the defendants. Defendants object, stating there is no finding or showing of bad faith on their part.

I agree with Mr. Morgan's analysis, that the American rule with respect to attorney's fees is that each party should bear his or her own cost for attorney representation. Only where there is explicit statutory contractural or judicial authorization should Courts or may Courts award attorney's fees, citing Alaska Pipeline Service Co. v. Wilness Society [sic], 421 US 240, 1975.

There is, however, as both parties concede, judicial authority to allow recovery where there are overriding considerations such as bad faith.

In this case there is no statutory or contractural authorization for attorney's fees, therefore, bad faith must be shown in order to shift the burden of the fees. The Court may award attorney's fees only if the Court makes a finding of bad faith in the case as against one or more of the defendants.

I am satisfied, as I indicated during the colloquy on the motions, that in respect to the initial representations made to the plaintiff in this matter they were not made in bad faith. However, accepting either version of the facts, even including the version adduced by the defendants that the plaintiffs made repeated inquiry regarding their status and the defendants -- again, even accepting their version as true -- attempted to obtain the reciprocal agreement, there is no dispute that when the defendants made the final determination that there would be no reciprocal agreement no one communicated that information to the plaintiffs, even though there was a clear obligation to do so.

Again, accepting the defendants' version for the purpose of this argument, they insisted that they were advising plaintiffs that even though they didn't have a reciprocal agreement they were obtaining one and when the moment arrived when they knew that it could not be obtained no one undertook to advise the plaintiffs of that.

The Court determines that that constitutes bad faith, but only on the part of Local 584 and the 584 fund.

I don't think that the prior union or the prior fund's obligation extended into the future. I think that 584 fund and 584 Local had a continuing obligation. They knew of the plaintiffs' concern and were under an obligation, particularly when they had made the final determination, to make a disclosure to the plaintiffs.

Failing to do so the Court finds that constituted bad faith. And the 584 Local and 584 fund, therefore, are under an obligation to pay counsel fees.

In respect to the amount of counsel fees, I would prefer that counsel discuss the matter and see if they can't agree as to what a reasonable fee should be. If they can't what I usually do is refer it to the Magistrate to make a recommendation to me as to the appropriate fees.

It shouldn't be necessary in this case because counsel for defendants certainly know the amount of work Mr. New did in this matter and I would hope that they would stipulate the amount of counsel fees even though I recognize that the award is over their objection.

So I leave it to counsel now to draft a final judgment in accordance with this decision incorporating into it as I have already indicated; past due pension benefits with interest calculation and what is due in the future or merely a determination of what payments will be made in the future if plaintiffs elect to accept payments in installments as they were entitled to with normal and regular pension payments.

So as to counsel fees, again I ask that counsel discuss the matter and see if they can agree upon a number and that should be inserted. If you can't agree then the judgment should provide that that issue should be referred to the Magistrate for report and recommendation.

APPENDIX "C"
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 29, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LUCIA NOVEMBRE and ANN DELUCA,

Plaintiffs-Appellees,

v.

LOCAL 584 PENSION TRUST FUND AND WELFARE TRUST FUND, et al.,

Defendants-Appellants.

No.81-2362

No.81-2363

Submitted Under Third Circuit Rule 12(6) July 21, 1982

Before: ADAMS and HIGGINBOTHAM,
Circuit Judges, and TEITELBAUM,
District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

s/ Arlin M. Adams
Circuit Judge

ATTEST:

s/ Sally Mrvos
Clerk

DATED: July 29, 1982

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*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX "D"
STATUTORY PROVISIONS INVOLVED

29 U.S.C. Section 152(5) provides that:

> The terms "labor organization" means any organization of any kind, or any agency or employee representation committed or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates or pay, hours of employment or conditions of work.

29 U.S.C. Section 159(a) provides in pertinent part that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

82-887

Office - Supreme Court, U.S.
FILED
DEC 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-737

LOCAL UNION NO. 680,
MILK DRIVERS AND DAIRY EMPLOYEES
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Cross-Petitioner,

vs.

LUCIA NOVEMBRE and ANNA DELUCA,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO THE CROSS PETITION OF LOCAL 680, MILKDRIVERS, ETC.

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QUESTION PRESENTED

Can a Union be held liable in damages because of the common law or equitable fraud, or misrepresentation, of its officers?

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CASES CITED:

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17 Law Ed. 842 (1967) 4

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

The question presented on the Cross Petition of Local 680 is whether a Union may be held liable in damages occasioned by its common law or equitable fraud or misrepresentation. The affirmative answer to this question is so well settled that no review is necessary.

The Cross Petitioner, Local 680, misconstrues the basis of the trial court's imposition of liability upon the Union. The trial court found that the Union's president and other representative had fraudulently misrepresented that the respondents would "carry over their respective pension credits from Local 680 to Local 607". (A13)[1]

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[1] The reference of A13 is to the Appendix filed by the Petitioner, Ice Cream Industries Drivers.

The trial court said:

"Insofar as they (Local 680) are concerned this is a simple case of misrepresentation with all of the essential elements[2] having been proved and the appropriate burden satisfied.

In Louis Schlessinger Company v. Wilson, 22 NJ 576, 585 (1956), the Supreme Court of New Jersey stated that the necessary elements for a fraud action are a false representation, knowledge or belief by the defendant of the falsity, and intention that the plaintiff act thereon, reasonable reliance in acting thereon by the plaintiff and resultant damage.

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[2] Referring to the "essential elements" of fraud or estoppel. See 3 Pomeroy's Equity Jurisprudence,, Section 805(5thEd.1941); Mount Vernon Fire Insurance Co. v. Highway Trailer Co., 385 U.S. 834, 87 S. Ct.77, 17 L.Ed.2d., 68(1966); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339(1979); Restatement of Contracts, Sec. 90.

The court has already indicated that there was a misrepresentation. Mr. McKinley admits that the representation was untrue in that he knew that there was no reciprocal agreement.

Those persons acting on behalf of the unions were authorized to do so. It was intended that the audience rely upon the representations.

Their reliance, as already indicated, was reasonable. And they sustained damages as a result of the loss of their pension benefits.

The court might also add that even if the version of Mr. McKinley were accepted by the court, namely, that plaintiffs were advised that there was no reciprocal agreement, but that the two funds would try to reach one, even when that fact was known to both of the funds and to the unions, no one bothered to inform the plaintiffs, even though there was a clear duty to do so at the time.

So the failure to speak as of that moment was likewise a misrepresentation.

Therefore, based upon the foregoing judgment shall be entered in favor of the plaintiffs and against the unions for damages equivalent to the pension benefits plaintiffs would have received less the actual contributions plus interest to be paid by the pension fund." (A18 and 19)

Therefore, the liability of Local 680 is not based upon the union's breach of contract for failure to properly represent the respondents[3] but upon a "simple case of misrepresentation" or common law fraud.

The Cross Petition argues that no failure of Local 680 to fairly represent respondents had been established under the standards laid down in Vaca v. Sipes, supra and its progeny, i.e., a union's failure to fairly represent its

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[3]Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 Law Ed.842 (1967).

members constitutes a breach of its contract with its member(s). For the reasons just stated, this misconstrues the holding of the trial court.

Of course, a union--as well as any other person or entity--must respond in damages for its fraud or misrepresentation, separate and apart from any breach of contract/duty of fair representation violation. Cross Petitioner does not and has not argued to the contrary.

CONCLUSION

For the reasons expressed above, the Cross Petitioner for Certiorari should be denied.

Respectfully submitted,

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BY: _____
HERBERT NEW

Dated: December 15, 1982
Livingston, NJ